

Trade Related Cultural Diversity in Exchange of National Treatment for Copyright

EUROPEAN ART AND CULTURE BETWEEN FREE TRADE
AND CULTURAL DIVERSITY. A DELICATE DIALOGUE?

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Cultural Diversity and Copyright

- Issue: How can a State promote cultural identities and cultural diversity without subsidies?
- Challenging the current dogma on the relationship between intellectual property rights and cultural policies
- Solution: A global “Cultural Contract” implementing cultural non-discrimination principles to promote cultural diversity

The Meaning of Cultural Diversity

- Recent instruments:
 - Council of Europe Declaration on Cultural Diversity (2000)
 - UNESCO Universal Declaration on Cultural Diversity (2001)
 - UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
- Value per se (global public good) and prerequisite for the freedom of opinion and expression (freedom of speech)

- Art. 1 of the UNESCO Declaration 2001:
As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.
- Preamble of Convention on Biological Diversity 1992:
Conscious also of the importance of biological diversity for evolution and maintaining life sustaining systems of the biosphere.

UNESCO Convention on Cultural Diversity (2005)

- Preamble:

Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, **and therefore is a mainspring for sustainable development for communities, peoples and nations,**

Recalling that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, **is indispensable for peace and security at the local, national and international levels,**

Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments,

EC Treaty

TITLE XII

CULTURE

Article 151

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. (...)

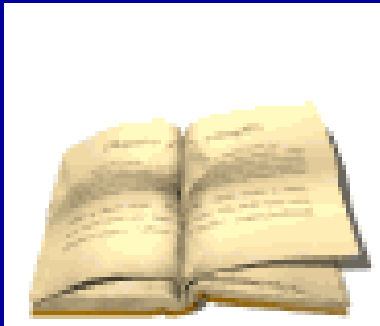
“On agit sur la réalité en agissant sur sa représentation.”

(Michel Foucault, *Les mots et les choses, Une archéologie des sciences humaines*, Paris 1966, p. 93: “You act on reality by acting on its representation.”)

“The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.”

(Edward W. Said, *Culture and Imperialism*, London 1994, p. xiii)

International Trade Related Cultural Goods and Services



European Commission (1999)

The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. (...) They therefore help to determine not only what we see of the world but also how we see it.

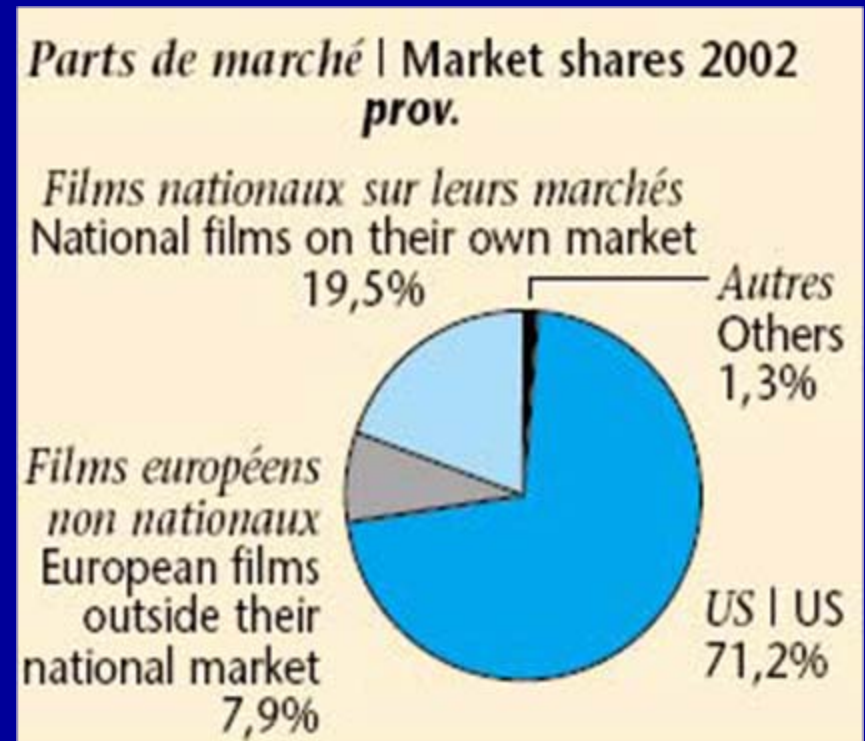
“Cultural Diversity”

- Work related indicators:
 - Language
 - Form / content
 - Message / “ideology”
- Market related indicators:
 - Market shares
- Other indicators?



State Aid for Cultural Diversity

- EU: More than EURO 1 billion per year (x 3 in private investments)
- Promotion of European cultural identities and cultural diversity
- “Fortress Europe” vis-à-vis third cultures



No State Aid for Culture

- USA: No State aid for “entertainment” industries
- DCs and LDCs: No money for “cultural” policies
- (EU tax payers finance the little remains of cultural diversity...)



Culture and International Trade

- Cultural policies distort trade: Promotion of national and regional culture is often discriminatory and, thus, inconsistent with NT and MFN principles
- Classical approach:
 - Assess the margin of manoeuvre of States to pursue cultural policies mainly via subsidies and quotas
- New approach: Use the intellectual property system (and competition law) as “good governance” tool in the area of cultural industries

“Dogma” of Cultural Industries (1)

© ↗ ≈ culture ↗

(1) No such “dogma” any more
for pharmaceutical industries
(“Patent & Health”)

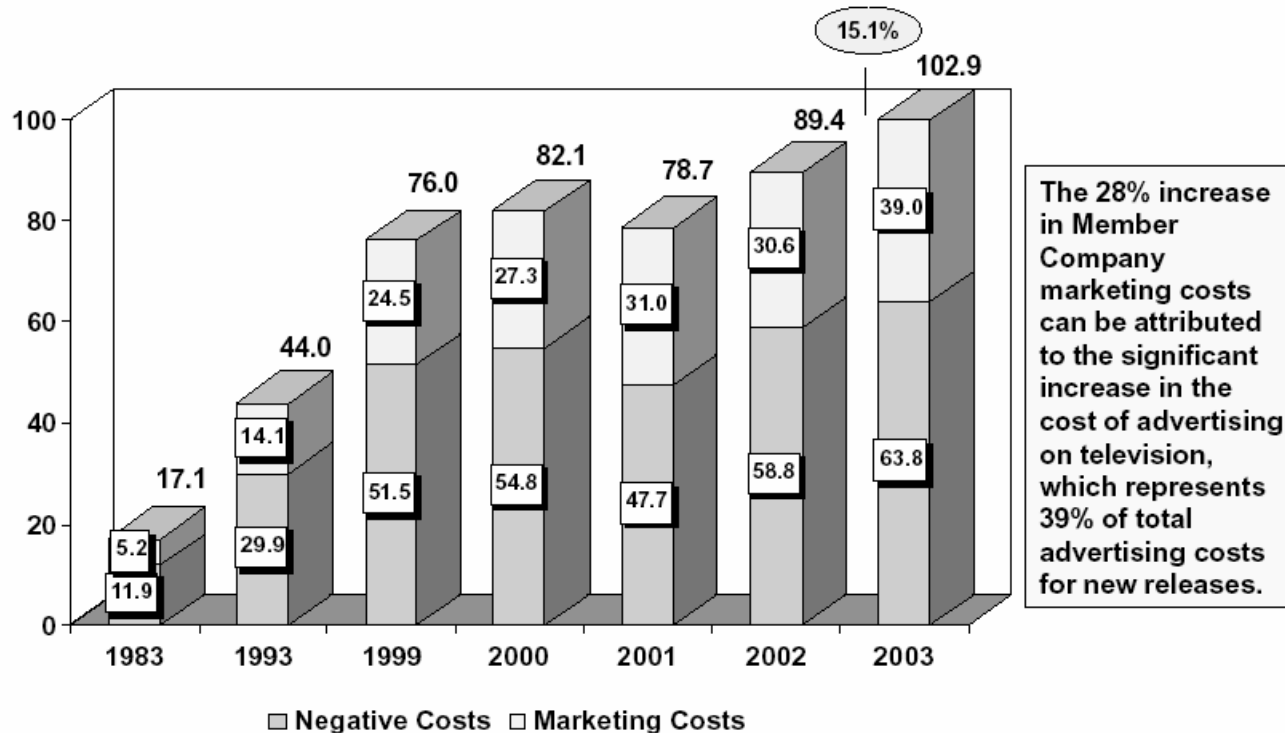
Scope of IPR Protection: 40 to make & 60 to sell (SPA)

U.S. Entertainment Industry: 2003 MPA Market Statistics

United States

Theatrical Costs

MPAA Member Company Average Theatrical Costs



Source: MPAA

“Prototype” Industries, a risky Business:

- Taste is unpredictable
- Asymmetry of information
- 10 blockbusters to off set 200 flops



The Meaning of Marketing (SPA)



- DA VINCI CODE
 - 160'000 in 3 days
 - Tom Hanks, Audrey Tautou
 - > 60 copies
 - > Euro 1 m marketing



- VITUS
 - 160'000 in 3 months
 - Bruno Gans (“Hitler”), Fredi M. Murer (Berlin Bär)
 - < 15 copies
 - < 0.1 m marketing

The Issues

- Market reality:
 - No access to competitive marketing
 - No access to the audience
 - No revenues to create and produce
- No access to the market: “Iconocide”?
- A little help from the State to survive?
 - The Hollywood Majors spend Euro 12 billion per year for SPA whereas the EU players only 4 billion for production (and a little bit for marketing)
 - What about economically poor countries?

The Competition Route

- Competitive investments in SPA as an “essential facility” (see Magill and Bronner cases)?
- Specific definition of relevant market for cultural industries based on marketing investments and not on price, use and characteristics (see Sony/BMG merger)
- Outside of the scope of WTO law (“Singapore Issue”)

The IPR Route: A Polemic “Formula”

TMC = SPA = TMC

Reaching a Level Playing Field

TMC = SPA = TMC

No Total Mono Culture

~~TMC = SPA = TMC~~

No Stars, Prints & Advertisement

$$\text{TMC} = \cancel{\text{SPA}} = \cancel{\text{TMC}}$$

No Trade Mark & Copyright

~~TMC = SPA = TMC~~

Solution

~~TMC = SPA = TMC~~

Piracy?

~~TMC = SPA = TMC~~

Sanction against
"cultural discrimination"?

The “Banana” Scenario



GATT, GATS & TRIPS

- “Cross-Retaliation” based on art. 22.6 DSU, WTO Arbitration Decision of 24 March 2000, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*; WT/DS27/ARB/ECU) :

MFN violation in banana trade triggers NT suspension for IPR of European right holders

- No access to competitive SPA due to “cultural discrimination”, i.e. CT violation, should trigger NT suspension for IPR of the private and public infringers.

A Global “Cultural Contract”

- **New deal:** IPR related NT and MFN in exchange of CT and MFC (see draft provisions in the abstract) to promote “cultural diversity”
 - Protecting foreign intellectual property in exchange of a contribution by the foreign owners to promote cultural diversity
 - *Sui generis* system based on IPR, competition and trade law (IPR rationale, “essential facilities” and “cross-retaliation”)
 - Compliance with TRIPS (Preamble, art. 7 and 8)?

For discussion:

Towards a “Cultural Contract”
against
trade related cultural discrimination

“Cultural Treatment” and “Most-Favoured-Culture”
to promote cultural diversity vis-à-vis international trade
regulations

in:

Joost Smiers / Nina Obuljen (eds.), UNESCO's Convention on the
protection and the promotion of cultural diversity. Making it work,
Culturelink, Zagreb 2006.